IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 3RD JULY 2007 / 12TH ASHADHA 1929

SA.No. 315 of 1994()

(AGAINST THE JUDGMENT AND DECREE IN A.S.63/91 ON THE FILE OF DIST.COURT, THODUPUZHA DTD. 30/09/93 REVERSING THE JUDGMENT AND DECREE IN O.S.248/1989 of THE MUNSIFF'S COURT, THODUPUZHA DTD. 25/06/1991)

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APPELLANT: (RESPONDENT/DEFENDANT):

THODUPUZHA MUNICIPALITY,
REPRESENTED BY ITS COMMISSIONER,
THODUPUZHA.

BY ADV. SRI.V.M.KURIAN
SRI.A.V.THOMAS
SRI.MATHEW B. KURIAN
SRI.K.T.THOMAS

RESPONDENT:(APPELLANT/PLAINTIFF):

ABRAHAM PHILIP,
S/O. ABRAHAM, AGED 47,
NARAKATHINAMKUNNEL,
THODUPUZHA VILLAGE.

BY ADV. SRI.RAJU JOSEPH

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 3/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

S.A.NO.315/1994 D

ORDER ON C.M.P.NO.567/1994 IN S.A.NO.315/1994

DISMISSED

3/07/2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

KSS

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 315 OF 1994

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DATED THIS THE 3rd DAY OF JULY, 2007

JUDGMENT

Defendant in O.S.248 of 1989 on the file of Munsiff Court, Thodupuzha is the appellant. Plaintiff is the respondent. Respondent is the owner in possession of ten cents of land in Survey No. 192/12 of Thodupuzha Village of Ward No.21 of Thodupuzha Muncipality. He instituted the suit seeking a decree for permanent prohibitory injunction restraining appellant Muncipality from demolishing the plaint schedule building pursuant to Ext.A9 and Ext.A10 proceedings initiated under Section 247(1) of Muncipalities Act which was finalised under Ext.A12 order. It was contended that on 27.10.1989, Ext.A12 order was received by the appellant and the order is arbitrary and against natural justice. Invoking power provided under Section 364 of Muncipalities Act, respondent filed an appeal. Contending that appellant threatened demolition of the building before the disposal of the appeal, and therefore appellant is to be restrained by a permanent prohibitory injunction from demolishing the building, suit was filed. Appellant filed a written statement contending that the suit is not maintainable

before exhausting the remedies provided under the Muncipalities Act and for that reason alone, the suit is to be dismissed. It was also contended that muncipal authorities have not given approval for the unauthorised construction made and the unauthorised construction was not agreed to be validated and the Muncipality is entitled to proceed under Section 247(1) of the Muncipalities Act and respondent is not entitled to the decree sought for.

2. Learned Munsiff on the evidence of Exts.A1 to A16, Ext.B1 to B6, Ext.C1 and Ext.C1(a) and Pws 1 to 3 and DW1 held that the respondent is not entitled to get a decree against appellant Muncipality from proceeding under Section 247 of Muncipalities Act and dismissed the suit. Respondent challenged the decree and judgment before District Court, Thodupuzha in A.S.63 of 1991. Learned Additional District Judge on reappreciation of evidence, held that Ext.A9 proceedings under Section 247 of the Muncipalities Act was initiated for extraneous considerations and held that civil court is competent to grant a decree for permanent prohibitory injunction and granted the decree as sought for but making it clear that the decree will not stand in the way of the Muncipality from proceeding against

appellant in respect of the construction of the first floor after giving valid notice with full particulars regarding the infraction of the statutory provisions or approved plan and license etc. The second appeal is filed challenging the said decree and judgment.

3. The second appeal was admitted formulating the following substantial questions of law.

1) Whether plaintiff can get the relief of injunction restraining the Muncipality from demolishing the building without challenging the orders directing demolition in the suit.

2)Was the suit maintainable as the plaintiff did not challenge the proceedings of the Muncipality on the ground of lack of jurisdiction or that order is void.

3)Whether the discretionary relief could be granted in favour of an admitted law breaker against the statutory authority which seeks to enforce the statutory provisions.

4)Can the first appellate court give a finding that notice issued by the Muncipality are vague, in the absence of pleading and challenge against the notice.

4. Learned counsel appearing for appellant and respondent were heard. The argument of the learned counsel appearing for

appellant was that in a suit where the only relief sought for is a decree for injunction, court is not competent to consider the validity of either the notice or the orders issued by the Muncipality under Section 247(1) of Muncipalities Act and when the appropriate remedy is provided under the Muncipalities Act, Civil court is not competent to grant a decree for injunction as has been done by the first appellate court. It was further argued that no decree for declaration was sought and so long as Muncipality is competent to proceed as provided under Section 247(1) of the Muncipalities Act and there is violation of the plan and license issued to the respondent, no decree can be granted in favour of the respondent especially when he has no case that Ext.A9 notice or Ext.A10 to A12 orders were issued without jurisdiction or are null and void. Reliance was placed on the decision of the Apex Court in **R.C. Sharma V. Union of India** (AIR 1976 SC 2037),**Dhruv Green Field Ltd V.Hukam Singh and others**(2002(6)SCC 416) and **Shiv Kumar Chadha V. Municipal Corporation of Delhi and others with D.M.Sawhney V. Municipal Corporation of Delhi**(1993(3) SCC 161). It was therefore argued that the decree and judgment granted by first appellate court is unsustainable.

5. Learned counsel appearing for respondent argued that Ext.A9 notice and Ext.A10 to A12 orders are vague and under Section 247A of Muncipalities Act, even if there is any construction in violation of the conditions of the permit or license, Muncipality is competent to regularise the same and respondent has applied for regularisation and in such circumstances, there is no reason to interfere with the decree granted by first appellate court. It was also argued that if the decree is to be set aside at this stage, respondent would be left with no remedy at all and in any case, the remedy provided under the Muncipalities Act is to be left open.

6. Section 247 of Kerala Muncipalities Act 1960 enables the Commissioner, if he is satisfied that the construction or reconstruction of any building is being carried out or has been completed otherwise than in accordance with the plan or particulars on which such permission or order was passed, to make a provisional order requiring the owner or the builder to demolish the work done or so much of it as in the opinion of the Commissioner has been unlawfully executed or to make such alterations as may in the opinion of the Commissioner necessary to bring the work in conformity with the Act, bye laws, Rules

provision or requisition or with the plans and particulars on which such permission or order was passed and also to direct that until the said order is complied with the owner shall refrain from proceeding with the building or land. Under Subsection 2 of Section 247, Commissioner has to serve a copy of the provisional order passed under subsection 1, on the owner of the building to show cause within a reasonable time to be named in such notice why the order should not be confirmed. Sub-section 3 of Section 247 enables the Commissioner, if the owner fails to show cause to the satisfaction of the Commissioner, to confirm the order with any modification he may think fit and such order shall then be binding on the owner and on the failure of the owner to comply with the order Commissioner may himself cause the building or part thereof to be demolished and the expenses recovered from the owner. Section 364 provides for an appeal before the council against an order passed under Sub Section 1 as well as sub section 3 of Section 247. The plaint itself discloses that after getting Ext.A9 notice and considering the cause shown by respondent, Muncipality passed Ext.A12 final order, confirming the provisional order passed under Sub section 1 of Section 247 and respondent invoked the remedy provided under

Section 364(1) of Muncipalities Act by filing an appeal. Respondent did not wait for the result of the appeal and instead rushed to the civil court seeking a decree for permanent prohibitory injunction.

7. The question is whether before exhausting the remedy provided under the Act, respondent is entitled to approach the civil court and seek a decree for permanent prohibitory injunction. True, Kerala Muncipalities Act does not specifically bar the jurisdiction of the civil court. But the question is whether there is an implied bar under the Act. When the Special Act affords an alternative remedy which is sufficient and adequate, the exclusion of the jurisdiction of the civil court is implied. The position has been settled by the Constitution Bench of the Apex Court in **M/s. Kamala Mills Ltd V. State of Bombay**(AIR 1965 SC 1942). The question was considered again in **Ram Swarup and others V. Shikar Chand and another**(AIR 1966 SC 893) and later in **Dhruv Green Field's case(**supra). Analysing the earlier decisions, the principles have been restated in **Dhruv Green Field's case** as follows:-

> **“10.** In the light of the above discussion, the following principles

may be restated:

1)If there is express provision in any special Act barring the jurisdiction of a civil court to deal with matters specified thereunder the jurisdiction of an ordinary civil court shall stand excluded.

2)If there is no express provision in the Act but an examination of the provisions contained therein leads to a conclusion in regard to exclusion of jurisdiction of a civil court, the court would then inquire whether any adequate and efficacious alternative remedy is provided under the Act; if the answer is in the affirmative, it can safely be concluded that the jurisdiction of a civil court is barred. If, however, no such adequate and effective alternative remedy is provided then exclusion of the jurisdiction of the civil

court cannot be inferred.

> 3)Even in cases where the jurisdiction of a civil court is barred expressly or impliedly, the court would nonetheless retain its jurisdiction to entertain and adjudicate the suit provided the order complained of is a nullity".

8. It cannot be disputed that when a provisional order or final order was passed either under sub section 1 or sub section 3 of Section 247, an appeal is provided under Section 364 before the Council and thereafter an appeal before the Chairman and a further remedy before the Government as provided under sub section 2 of Section 364. It is therefore clear that sufficient and adequate remedy is available under the special Act. If so, unless the order passed by Commisioner under Section 247 is a nullity, or was bad for want of jurisdiction, the jurisdiction of the civil court is impliedly barred and respondent is not entitled to seek a decree for injunction restraining the Muncipality from enforcing

the order passed under Section 247 of the Act.

9. It is more so, when the suit is only for injunction and no decree for declaration that Ext A9 proceedings issued under Section 247 of the Muncipalities Act was sought on the ground that it is bad for extraneous consideations or for want of bonafies or when Ext.A10 to 12 orders are not challenged on the ground that they are in violation of natural justice or are against the provisions of the Act. In such circumstances first appellate court was not correct in interfering with the decree passed by trial court. When under Section 247, it is within the jurisdiction of the Commissioner to act, when he is satisfied that the respondent has made constructions in violation of the permit and license granted to him and it is not disputed that construction has been made in violation of the permit and license a decree should not have been granted. In fact what was contended by appellant was that an application for regularisation of the construction made in violation of the permit and license was made before the Muncipality under Section 247A of the Act. But it was rejected under Ext.A16. Respondent cannot dispute the fact that he has made constructions in violation of the plan and license, which enabled him to construct the disputed building.

In such circumstances civil court cannot grant a decree to perpectuate the violation and that too restraining Corporation from exercising the statutory function provided under the Act.

10. Appeal is allowed. The decree granted by first appellate court in A.S.63 of 1991 is set aside. The decree and judgment passed by the trial court dismissing the suit is restored.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-